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In the Supreme Court of the United States

OCTOBER TERM, 1957

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 25–34) is reported at 240 F. 2d 341.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1957. The petition for a writ of certiorari was filed on June 13, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals correctly held that there is substantial evidentiary support for the Fed-

eral Trade Commission's finding that petitioners had participated in a nationwide price-fixing conspiracy.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in part as follows:

> (a)
>
> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * *

STATEMENT

On October 5, 1948, the Federal Trade Commission issued a complaint charging that the National Paper Trade Association ("National"), twenty-three affiliated local trade associations, including petitioner Metropolitan Bag & Paper Distributors Association, Inc. ("Metropolitan"), various officials of the associations, and all of their dealer members, had conspired to fix uniform prices and discount terms in the sale and distribution of fine and wrapping paper, in violation of Section 5 of the Federal Trade Commission Act (Pet. App. 190a–205a, Resp. App. 31–32 [1]).

[1] "Pet. App." refers to petitioners' appendix in the court of appeals, and "Resp. App." refers to the Commission's appendix in that court.

Petitioners filed an answer in which they consented to the introduction of documentary and other evidence in support of the complaint, conceded that "inferences may be drawn from such answer and documentary evidence in support of the allegations of the complaint" (Pet. App. 206a), and stated that "they will not offer explanation of or evidence to contradict the evidence" which they consented to being "made a part of the record" (*ibid.*).

After lengthy administrative proceedings, at which a large number of documents were introduced in evidence (*id.*, 2a–3a), the Commission, in September 1954, issued detailed findings in which it concluded that a nationwide conspiracy to fix paper prices had been shown, and issued a cease-and-desist order (*id.*, 4a–68a). In brief, the Commission found that the conspiracy had been spearheaded by National, that the various local constituent associations, in cooperation with National, had effectuated the agreement, and that a number of dealer members of the associations, including petitioners, had been parties to the scheme.

Specifically, the Commission found that since 1934 National had conducted "annual cost and selling price surveys" among its members "in all sections of the country" (*id.*, 39a); that it had distributed to its members various price books (*id.*, 39a–46a) which the members had used "in determining the prices at which they sold their products" (*id.*, 41a; 47a–49a); that officials of the national association had discussed the preparation and use of the price books at local and

regional association meetings (*id.*, 46a); that the various dealer members in each respective trade area calculated their prices in a similar manner (*id.*, 48a), and used publications of the national association to fix such prices (*id.*, 49a); and that executive officials of the local and regional associations in turn cooperated with National in advising and assisting members in arriving at uniform cash discounts in their respective trade areas, and discussed this matter at meetings of the local associations (*id.*, 52a). The Commission further found that each of the regional associations "has engaged in activities relating to the pricing by its members of their paper products," and that "[t]he record contain[ed] numerous exhibits relating to the activities of these associations which indicate that they have concurred in and implemented activities of the National Association" of which the Commission cited "typical examples" (*id.*, 53a–56a).

On the basis of the entire record, the Commission concluded (*id.*, 57a) that the dealer conspirators, together with National and the local associations and their officers, had "entered into and * * * carried out an unlawful planned course of action, understanding and agreement to hinder, lessen, eliminate, limit, and restrain competition in prices, practices, terms and discounts * * * in the sale and distribution of fine and wrapping paper," and, pursuant to such conspiracy, had "established uniform and identical prices, terms and discounts * * * in their respective trade areas" (*id.*, 58a).

Judicial review of the Commission's order was sought only by one local trade association and several

dealers. The court of appeals set aside the order as to five of the dealers for lack of evidentiary support, holding that "the Commission may not infer participation in a conspiracy from mere membership in the trade association without more" (Pet. 31). The court concluded, however, that there was substantial evidence linking the other parties to the conspiracy, and it affirmed and enforced the order as to them. Specifically, it ruled (Pet. 28) that Metropolitan, together with three other local trade associations in the New York City area, had engaged in a "regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint," and that there were "six points of contact between this regional conspiracy and the national one"; and that, in 1948 and 1949, officials of the dealers had been officers of Metropolitan or of the other local associations, and had actively participated in their affairs (Pet. 29–30).

ARGUMENT

Petitioners do not challenge the Commission's findings that a nationwide price-fixing conspiracy existed in the fine and wrapping paper industry, and that the national trade association, a large number of local associations, and numerous dealer members were parties thereto. The only question which they properly present is, as framed by the court of appeals, "wnether as to each petitioner the Commission's finding of participation [in the national conspiracy] is supported by the necessary minimum of substantial evidence" (Pet. 27). The court of appeals, upon a careful review of the evidence, held that the Com-

mission's findings that petitioners had been parties to such a national conspiracy were supported by substantial evidence. The correctness of these factual rulings presents no question of general importance warranting further review. Furthermore, we submit that the court below correctly decided these questions.

Recognizing that "this Court does not review facts" (Pet. 14), petitioners argue (1) that although the Commission's complaint charged "a single national conspiracy" (Pet. 15), the court of appeals upheld the order against petitioners only by "formulat[ing] a new charge of prior unrelated local conspiracies" (Pet. 14), and by relying on "evidence of a number of separate conspiracies executed through a main key figure," in violation of *Kotteakos* v. *United States*, 328 U. S. 750 (Pet. 15); and (2) that the Commission's findings of petitioners' "individual participation" in the conspiracy were "based on membership alone" in a trade association (Pet. 10), and that the court of appeals, in upholding those findings, placed too "great weight on the membership of each of the respondents [petitioners] in the local and national association" (Pet. 14). These arguments, we believe, misconceive the basis for the court of appeals' decision.

Although the court of appeals stated that four local trade associations, including petitioner Metropolitan, "engaged in a regional conspiracy to fix prices and credit terms of wrapping paper product from 1934 to the time of the complaint" (Pet. 28), the court did not uphold the Commission's order against petitioners on the basis of their participation in a regional conspiracy which was something separate and apart from

the national scheme. On the contrary, the court pointed out (Pet. 27) that the "main conspiracy, spearheaded by National" must be deemed established, and that the "chief question is whether there was substantial evidence to link the petitioners" to certain of the goals of that conspiracy, including that of "cooperat[ing] with regional efforts at price-fixing." The so-called "regional conspiracy" referred to by the court, therefore, was merely a shorthand phrase for the efforts of the local trade associations in the area to effectuate the national conspiracy, "spearheaded by National," to fix prices for the entire industry.[2] The complaint in this case did not charge, as petitioners contend (Pet. 13), that their participation in the conspiracy was limited to the use of "price books." It broadly alleged that they, together with numerous other associations, firms, and individuals, had been parties to a general price-fixing conspiracy, the means of which included a wide variety of anticompetitive practices (see Paragraph Eight of the Complaint, Pet. App. 196a–197a). The fact that petitioners were not shown to have participated in the use of price books would not preclude the Commission from holding, upon the basis of other evidence, that they had participated in the conspiracy.

Nor did the court uphold the order against the dealer petitioners solely upon the basis of their trade

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[2] Thus, the court did not draw "inferences which the Commission itself had not drawn," as petitioners contend (Pet. 9). The fact that the court set forth some of the evidence in greater detail than the Commission did affords no basis for challenging the decision below.

association membership. Indeed, the court set aside the Commission's order as to several dealers with respect to whom it found that the only conspiratorial link was association membership, on the ground that "the Commission may not infer participation in a conspiracy from mere membership in the trade association without more" (Pet. 31).

However, the court of appeals properly gave appropriate weight to the individual dealers' participation in the price-fixing activities of the national and regional associations. These groups were the vital links through which the conspiracy was effectuated, and the court was fully justified in relying upon such participation as significant evidence that petitioners were parties to the conspiracy. Cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 719–720, where evidence that particular firms were members of, and their officials were active in affairs of a national trade association which "participated in numerous activities intended to eliminate price competition through the collective efforts" of its members, was held pertinent in linking firms to a nationwide conspiracy. Here, as in *Cement Institute*, the record contains "abundant evidence as to common practices of these respondents [petitioners] and the others on the basis of which the Commission was justified in

finding cooperative conduct among all to achieve * * * price uniformity" (p. 719).[8]

CONCLUSION

The decision below is correct, no important question is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] We shall not burden the Court with a detailed summary of the evidence upon which the court below relied. As an illustration, however, we note that the record shows, with respect to Metropolitan, that the four local associations in the New York City area pledged cooperation with each other as early as 1934 (Ex. 749, Pet. App. 322a; Ex. 753–A—753–C, Pet. App. 325a), and acted jointly to fix resale prices and credit terms (Ex. 744–A, Resp. App. 34; Ex. 761, Resp. App. 38–39; Ex. 747–A, and 747–B, Pet. App. 318a–319a; Ex. 748–A—748–C, Pet. App. 320a, 321a; Ex. 753–A—753–C, Pet. App. 325a; Ex. 755–A—755–C, Pet. App. 327a; Ex. 762, Resp. App. 39; Ex. 764, Resp. App. 40–41; Ex. 765, Resp. App. 41; Ex. 766, Resp. App. 42; Ex. 653–A—653–B, Pet. App. 295a–296a; Ex. 654–A—654–D, Pet. App. 302a–303a; Ex. 657–A—657–D, Pet. App. 305a–306a).

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